SERVED: April 8, 1992

NTSB Order No. EA-3527

UNITED STATES OF AMERICA

NATIONAL TRANSPORTATION SAFETY BOARD

WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 19th day of March, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v. Docket SE-9006

RICKY L. TEAGUE

Respondent.

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge William E. Fowler, Jr. on September 6, 1989 (at the conclusion of an evidentiary hearing), and confirmed by order of October 17, 1989.[1] By those decisions, the law judge affirmed an order of the Administrator suspending respondent's commercial pilot certificate for 60 days for his alleged violation of sections 91.9 and 91.79(b) of the

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[1] That portion of the September hearing transcript that contains the oral initial decision and order is attached. The October order, as pertinent, states only that the oral initial decision is "finalized." The law judge's use of this two-stage procedure is discussed infra.

Federal Aviation Regulations ("FAR"), 14 C.F.R. Part 91.[2]

The complaint arose as a result of respondent's May 30, 1987 piloting of a banner-towing flight above and in the vicinity of Ray Stadium, Meridian, MS, while a concert was in progress. Respondent was alleged to have overflown the stadium and environs at an altitude of less than 500 feet. Based on the testimony of one eyewitness,[3] the law judge found that respondent's altitude was approximately 200 feet (Tr. p. 99), in violation of both cited sections. Respondent did not appear, and no witnesses were offered on his behalf. After the oral initial decision was issued and in accord with the law judge's instructions, respondent submitted a deposition in which he denied flying at less than 1,000 feet.

Respondent has appealed, claiming that he was denied due process and noting especially the Board's failure to serve the

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[2]FAR § 91.9 (currently 91.13(a)) provided:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

FAR § 91.79(b) (currently 91.119) provided:

> Minimum safe altitudes: General
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> Except where necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
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> (b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

[3]The Administrator offered two witnesses. The other testified as to the FAR requirements and the FAA's investigation.

notice of hearing by certified mail, an alleged violation of 49 C.F.R. 821.8.[4] For the reasons that follow, we agree that the procedure used in this case was inappropriate, inconsistent with our rules, and had the effect of denying respondent a fair opportunity to be heard. We, therefore? grant. the appeal and remand this case for further proceedings consistent with this opinion.

A chronology of the procedural history of the case is necessary. The initial notice of hearing, which provided 30-days' notice, was apparently properly served by certified mail.[5] Due to a scheduling conflict, respondent requested and received a postponement pending further order.

The record indicates that, on August 3, 1989, the hearing was reset for September 6, 1989. Counsel for the Administrator, in an affidavit, indicates she received this information by telegram on August 3rd. Both respondent and his attorney (Mr. Bankester) testify, under oath, that they were not so advised.

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[4]This procedural regulation provides, in relevant part:

> (a) Service by the Board. The Board will serve orders, notices of hearing, and written initial decisions upon the parties to the proceeding by certified mail. Other documents will be served by certified mail or by regular mail (including U.S. Government franked envelope).

(Emphasis added.) Respondent also argued, based on his categorical denial and the alleged bias of the Administrator's eyewitness, that the evidence presented by the Administrator failed to support the law judge's conclusion. Due to our conclusion regarding the procedural issue, we do not reach this question.

[5]Respondent alleges no irregularity there, and the docket contains the certified mail return receipt from respondent Teague.

According to Mr. Bankester, and confirmed by an assistant in his office, they learned of the hearing only the day before (September 5th), and only in the course of a telephone call from a staff member in the NTSB's Office of Administrative Law Judges concerning an entirely different subject.[6] Mr. Bankester was otherwise engaged and was unable to prepare for or attend the next day's hearing. Respondent did not attend (the reason not being of record).[7]

Mr. Bankester was able to locate a Jackson, MS attorney (Mr. Chance) to appear at the hearing. Mr. Chance immediately sought a continuance, reporting the prior day's conversation with Board personnel, and noting an apparent lack of Board records showing any telegram communication to Alabama during the relevant period. He also pointed out that he was inadequately prepared to proceed, having received but a few faxed documents from Mr. Bankester only 1 hour prior to the hearing. Tr. at 2-5.

In response, the Administrator's counsel stated her readiness to proceed. She did not, however, offer any information regarding the issue of notice to respondent or his counsel.

The law judge denied the request for a continuance. He

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[6]The call concerned the absence of attachments referred to in the Administrator's responses to interrogatories. At the hearing, it also was argued that discovery had therefore not yet been completed and the hearing was premature.

[7]We note in this regard that the hearing was scheduled in Jackson, MS. Respondent lived in Florida, and at the time was working for Eastern Airlines out of Miami. Mr. Bankester's office was in Robertsdale, AL.

found that a telegram dated August 3, 1989 was sent to respondent, and to Mr. Bankester. He went on to hold that:

> These telegrams are always followed up with certified mail as well as sometimes a regular--if the certified mail is returned, then it's--regular mail is sent. This is highly unusual if in fact neither counsel for the respondent or the respondent did not receive notice of this hearing.

Tr. at 8. However, the law judge indicated that he did not have the return receipt (nor are there any in the docket, other than the one mentioned above for the first-scheduled hearing). The law judge concluded that the age of the case and the expense to the government, as well as the case load of his office, militated against a continuance "unless it's practically a life-or-death matter." Tr. at 9.

The law judge then attempted to minimize the harm from this result by allowing the record to remain open for 45 days, so that respondent could introduce evidence, by affidavit or deposition.[8] As noted, the law judge did not, however, await the record's close before issuing his initial decision.

While we share the law judge's overall concern that decisions not be unnecessarily delayed and would encourage innovative procedures to correct particular procedural mishaps, concerns for timeliness may not and do not outweigh a respondent's right to due process. Accord Administrator v. Bays, NTSB Order EA-2660 (1988). The approach adopted in this case was

[8]Respondent did so, filing his own deposition urging his innocence. He denied receiving any notice of the September hearing.

inadequate to ensure a fair hearing. One matter, especially, compels us to vacate the law judge's decision and direct a new hearing.

The notice of the rescheduled hearing was a "notice of hearing" as that term is used in 49 C.F.R. 821.8. As such, our rules required that it be sent by certified mail. The facts do not support the law judge's finding that it was so sent, and we are compelled to reverse it. Administrator v. Wolf, NTSB Order EA-3450 (1991).

The Administrator's counsel testified in her affidavit that she received the notice via telegram. There is no indication in the record that she received a follow-up certified letter, as suggested by the law judge. Furthermore, the Administrator does not argue, nor is there any basis in the record to support the law judge's finding that, in this case (as opposed to what he described as the general practice), both respondent and his counsel received the notice via certified mail.[9]

The effects of the notice defect in this case warrant a hearing de novo, wherein respondent and his counsel-in-fact are provided proper notice and thereby given the necessary opportunity to prepare their case, and where any and all witnesses for both sides appear before the law judge so that he

[9] There is equally no record basis in this case for his finding that telegrams were sent to both of them. In fact, the evidence supports the contrary conclusion. The document in the docket dealing with telegraphic notice of the hearing date indicates two addresses: Mr. Bankester's and that of the Administrator's counsel. Respondent himself is not even listed.

may better assess credibility.[10] The events and results here illustrate exactly why 49 C.F.R. 821.8(a) -- which we expect will be followed in every case -- demands a higher likelihood of service than that offered by telegram delivery. Neither respondent nor his counsel were able to attend the hearing. The attorney who did attend for Mr. Bankester was unprepared. Regardless of the law judge's opinion regarding either the credibility of the Administrator's witnesses or Mr. Chance's ability, with little preparation, to cross-examine them, respondent was denied a fair opportunity to be heard.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted;

2. The law judge's orders of September 6 and October 17, 1989 are vacated; and

3. This matter is remanded for further de novo proceedings consistent with this opinion.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT , Members of the Board, concurred in the above opinion and order.

[10]Use of after-hearing depositions thwarts a prime purpose of oral hearing -- to allow the law judge to study witness demeanor in assessing credibility. The process used here prevented the law judge from a face-to-face assessment of conflicting testimony. We also suggest that holding open the record after issuing an initial decision is, in effect, more in the nature of a petition for reconsideration than it is a neutral or useful method of mitigating a perceived due process defect.